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NO. _____

IN THE
SUPREME COURT COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CARLOS S. SOTO and ROBERT DEMALLORY, on behalf of themselves and all others similarly situated,
Petitioners

v.

WALTER J. DICKEY, WARREN YOUNG AND THOMAS BORGEN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This is a class action brought by inmates at the Waupun Correctional Institution (WCI) alleging that the

defendants, the Administrator of the Wisconsin Division of Corrections, the Superintendent and the Assistant Superintendent at the Waupun Correctional Institution violated their constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution and the Rules and Regulations of WCI through the improper use of chemical agents. (App. 5). The district court found that the defendants' policy and practice of using chemical agents violated the inmates' constitutional rights under the Eighth and Fourteenth Amendments and further were in violation of the Division of Corrections Administrative Regulations, Chapter HSS 306.08. (App. 6-7).

After trial the district court issued an injunction restricting the use of chemical agents against inmates except

in specific circumstances which were set forth in the court's order. (App. 7) The district court denied the claim for damages by inmate Soto, finding that the good faith immuity defense was available to defendants. (App. 7).

The Court of Appeals reversed the district court's decision and the injunction was dismissed and costs were awarded to the defendants. (App. 55-56).

The petitioners argue three reasons for granting the Writ of Certiorari:

1. The Court of Appeals assumed that the standard established for a violation of the Eighth Amendment is the same as a standard for a violation of the Fourteenth Amendment.

2. The Court of Appeals substituted its opinion of the evidence for that of the district court.

3. This Court should determine whether the use of chemical agents under the circumstances of this case as found by the district court violates inmates' rights under the Eighth and/or Fourteenth Amendment of the United States Constitution.

REASONS FOR NOT GRANTING WRIT OF CERTIORARI

I. The Case Is Moot.

As the petitioners correctly note at p. 23, footnote 4 of their Petition For Writ of Certiorari, the Wisconsin Department of Corrections has, as of November 1, 1984, adopted an amendment to HSS 306.08 "which would provide more detailed restrictions regarding the use of chemical agents against inmates." The

amended rules and regulations are set forth at pp. 160-167 of the petitioners' appendix.

The proposed "order of the Department of Health and Social Services repealing and recreating rules" incorporates the concerns and provisions of the district court's original order and decision. (Appendix pp. 57-116).

The petitioners in this court seek only a review of whether or not injunctive relief was warranted because of violations of the Eighth and Fourteenth Amendments. The petitioners claim that the defendants' policies and practices regarding the use of chemical agents violated the rules and regulations previously in effect at WCI. Since those rules are no longer in effect at WCI, the case is moot.

This Court should not decide an issue which does not affect the rights of the parties. Board of License Commissioners of the Town of Tiverton v. Louis H. Pastore, et al., 53 U.S.L.W. 4057 (Jan. 8, 1985).

The new Department of Health and Social Services rules foreclose the practices of which the petitioners complain and thus no decision on the merits by this Court will have an effect on the parties. DeFunis v. Odegaard, 416 U.S. 312, 320 (1974). The case is moot for the purpose of injunctive relief.

II. No Conflict Among The Circuits

The Petition for a Writ of Certiorari fails to demonstrate that the decision of the Seventh Circuit Court of Appeals creates a conflict among the circuits to the extent that this Court

should hear this case. See Supreme Court Rule 17.1(a)(b). United States v. Morton, 104 S. Ct. 2769, 2772 (1984); Mabry v. Johnson, 104 S. Ct. 2543, 2546 (1984); I.N.S. v. Stevic, 104 S. Ct. 2489, 2492 (1984).

III. The Court Of Appeals Correctly Analyzed The Standard For An Eighth Amendment And/Or A Fourteenth Amendment Violation.

Petitioners suggest that the Seventh Circuit mistakenly equated a violation of the Eighth Amendment and the Fourteenth Amendment. A cursory reading of the Appellate Court's review reflects that its factual analysis and determinations provide the basis for determining whether an Eighth and/or Fourteenth Amendment has taken place. The Court of Appeals did an

extensive review of the district court's findings of fact and conclusions of law. (App. 7-37).

The appropriate standard for reviewing a Fourteenth Amendment violation is whether the practices complained of constitute punishment in the constitutional sense; this depends on whether they are rationally related to a legitimate non-punitive governmental purpose and whether the practices appear excessive in relation to the purpose. The Seventh Circuit held that the petitioners simply did not meet their burden of showing that correctional officials at WCI exaggerated the response to the genuine security considerations that actuated the restrictions and practices. (App. 53-55). Bell v. Wolfish, 441 U.S. 520, 561-562 (1979).

The Court of Appeals in its extensive review of the district court's findings and conclusions, emphasized the institution's concern for the safety of its staff and inmates. (App. 11-14). Indeed, this Court has always insisted on the need for deference to correctional administrative personnel. Rhodes v. Chapman, 452 U.S. 337, 351 (1981); Bell v. Wolfish, 441 U.S. at 539; Procunier v. Martinez, 416 U. S. 396, 404-405 (1974), "The responsible institutional personnel on the spot are in a better position to determine when its use (chemical agents) is necessary than the Court's." (App. 51-52). "The record in this case fails to disclose that prison officials unjustifiably used excessive force against plaintiffs..." (App. 53). The Court of Appeals found the use of chemical agents under the

circumstances presented by this case was "a reasonable response to the institution's legitimate security concern." (App. 54).

The Court of Appeals was correct in holding "the evidence does not establish that the actions and conduct of the institution or its personnel, or the regulations of the institution or their application violate the Eighth or Fourteenth Amendments, or that a chemical agent has been unjustly or improperly used." (App. 55).

In Bell v. Wolfish, 441 U.S. 520 (1979), this Court considered confinement conditions of pre-trial detainees and determined that their rights to due process had not been violated by the conditions. Bell found that the proper inquiry of this Court is whether the conditions or practices complained of

amount to punishment and held that prison officials may subject a pre-trial detainee to conditions and restrictions which do not amount to punishment and do not violate the Constitution. 441 U.S. at 535-536.

The Court of Appeals' review was consistent with that required by this Court and its findings support its reversal of the district court's injunction. Bell v. Wolfish, 441 U.S. at 561-562.

IV. The Court Of Appeals Did Not Exceed Its Authority In Reversing The Order Of The District Court.

The Court of Appeals found itself bound by findings of fact of the trial court unless clearly erroneous. (App. 16-17) This rule, the Court concluded, does not apply to conclusions of law. (App. 17).

The Court of Appeals found that the trial court erred in the conclusions

because they were reached from an incomplete and thus erroneous consideration of only part of the evidence. (App. 20-21). The record uncontradictedly establishes that the use of chemical agents was justified for the inmates' repeated refusals to obey an order to come to the front of the cell to be handcuffed. (App. 22-23).

> ....In the instances shown in the record, the chemical agent was used for failure of the inmate to obey a direct order and the use of mace was a reasonable response to the institution's legitimate security concern.

(App. 54).

The petitioners did not meet their burden to demonstrate that the defendants intentionally used exaggerated or excessive means to maintain discipline, nor have they shown that the means used inflicted excesive or grossly severe

punishment. (App. 54-55). Thus, the Court of Appeals correctly concluded the evidence does not establish an Eighth or Fourteenth Amendment violation.

This is a fact-bound case, not appropriate for certiorari. Petitioners seek a de novo review of the record in the hope this Court will conclude there was enough evidence to support the district court's findings. Of course, respondents believe the Seventh Circuit's careful analysis of the record shows petitioners' effort to be fruitless. More critically, whether the Appeals Court was correct in its application of the "clearly erroneous" standard is insufficient to warrant the writ.

CONCLUSION

For the reasons cited above, the Court should deny certiorari.

Respectfully Submitted:

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